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(City and County—Organized 1888)

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Option Contracts

By FRANK JAMES *of the Los Angeles Bar*

President, Los Angeles Bar Association, 1921 and 1922. Author of JAMES ON OPTION CONTRACTS and JAMES ON MECHANIC'S LIENS

(ADDRESS AT MEETING OF LOS ANGELES BAR ASSOCIATION, FEBRUARY 17, 1927)

The option contract has become a member of the great family of contracts; it has been given its place in our law through its recognition and development by the courts.

This contract represents another instance where courts to meet the exigencies of modern business requirements, have recognized a form of transaction which the commercial and industrial worlds now deem indispensable for the successful and convenient handling of large transactions.

The utility of the contract has firmly fixed the option in American and English jurisprudence. I venture to remark that hardly a day passes in any business establishment without the use of some of the many forms to which the option has been adapted.

The option, perhaps, is more extensively used in transactions for the purchase of property than in any other single business dealing, but, nevertheless, the frequency of its other uses must be familiar to every lawyer and in fact to every man of affairs.

Options may conveniently be classified as options to sell, options to buy, options to return; options in leases to renew, to extend, or to terminate; options maturing the principal of promissory notes and debts secured by mortgage upon default. The above list is by no means complete, since options are employed in various other ways.

The most notable employment of the option is in the promotion of huge industrial mergers. The option affords a convenient method by which several independent members of some great industry can be bound to transfer their respective properties and businesses into the merger, at the option of the promoters, and in this way consummate a deal involving millions without hazard beyond the consideration paid for the option privilege.

The option contract falls within the rules of law applicable to contracts generally. The outstanding features of this contract, and the ones that have received most careful attention by the courts, are its validity and its enforceability.

The very purpose of the option to purchase is to "tie up" property during the option period so that the optionee, during the option period, may turn the property for his betterment either on a resale or as part of a scheme for the promotion of the industry of which it may be a part. It is evident that if the purpose of the optionee may be thwarted by the owner of the property, the option becomes a worthless piece of paper.

It would probably be inaccurate to say that if the option contract were legislated out of legal existence, the great business and industrial mergers which are so common these days could not be accomplished, but it is accurate to say that it would be necessary to find some sort of substitute and that none has as yet been suggested.

As we measure progress in the law it is not so long ago that the option contract, both by bench and bar, was looked upon as more akin to a mere offer, or a mere proposal, than to a real contract.

The law of proposal and acceptance as a means of contract making is old in the law of contracts and is well understood.

It has taken some time to acquaint judges and lawyers with the characteristics which distinguish the option contract from proposal and acceptance on the one hand, and the ordinary contract on the other, and even at this late day it is not infrequent that briefs and decisions bear witness that these characteristics are still unrecognized in some quarters. It is for these reasons that it is desirable, at the very threshold of this address, to be reminded of a few elementary things concerning the law of contracts.

When A signifies to B his willingness to do or to abstain from doing anything

for the purpose of obtaining the assent of B thereto, A, it is said, makes a proposal to B.

When B signifies his assent to A's proposal B accepts A's proposal.

Now, a proposal when accepted becomes a promise and for convenience A is called "promissor" and B is called "promisee."

To put the above in concrete form: A says to B who is present, I will sell you certain personal property for one hundred dollars, cash and B says, I will give you one hundred dollars cash for the property. A's proposal, or offer, is thereby accepted.

The thing that gives the above transaction its recognition in the law as binding each party to the other is the presence of what is called "consideration," and this consideration arises out of "acceptance" which constitutes a promise on the part of B to pay the price of the property to A. In other words, consideration arises whenever a promisee does, or abstains from doing, or promises to do, or to abstain from doing, something.

Agreement, as we understand that term in the law of contracts, arises out of a promise or a set of promises which forms the consideration. An agreement which is enforceable by law is a contract.

I shall refer firstly to the differences between Proposals and Options, and secondly, to Form and Consideration.

Proposal, or offer, is an invitation for a bargain; it is the first in a series of steps for an agreement. A offers to sell certain property to B for a certain sum of money, or perhaps, the transaction takes on the form of exchange. B is at liberty to accept or reject the offer. If B signifies his acceptance of the offer, bargain is struck, that is, agreement between the parties is reached. If B signifies his rejection, no legal consequences follow and the negotiations are ended.

Where the parties negotiate face to face and no time limit is fixed and none is implied the offeree is required to signify his acceptance immediately, and if he fails to do so, his delay will signify his rejection.

When the offer is made through the post, or by wire, or by some other similar means of communication, acceptance of the offer need not be made in person, but the offeree may communicate his acceptance to the other party through the same channel.

The agreement is concluded the moment of acceptance. In a case where the parties are negotiating in the presence of each other, or by telephone, the acceptance is usually communicated orally and is immediately received by the proposer. When the parties negotiating are at different places and are negotiating through the post or by wire, for instance, the acceptance is deemed made at the time of the deposit of the letter in the postoffice, or of the telegram with the telegraph company for transmission, and not when received by the proposer. This rule is necessary, courts reason, in order to prevent the proposer from withdrawing his proposal during the transit of the acceptance.

The very nature of proposal indicates that it is not intended to be binding upon the proposer unless the party to whom it is made accepts the proposal during the period the offer is open. The rule is more often expressed by saying that the proposer may withdraw his offer at any time before the party to whom it is made signifies his acceptance, or as said by the California Supreme Court in Thomas v. Birch, 178 Cal. 483, 489, "an agreement for an option not based upon consideration is simply a continuing offer which may be revoked (by the optionor) at any time" before acceptance by the optionee.

The cases we have had in mind so far are those where the proposer has not expressly given a fixed period within which the other party may signify his acceptance. It is not infrequent, however, that the party proposing fixes a definite date on or prior to which the other party may signify his acceptance.

The cases we have had in mind are those, also, where the parties intend to make an agreement fastening mutual obligations upon the respective parties.

In negotiating for the ordinary bilateral contract, the parties intend to conclude that sort of a contract, but in treating for an option contract the parties have in mind two contracts. These two contracts cover separate and distinct subject matter.

When a purchaser treats with the owner of property for an option as popularly understood, he is endeavoring to secure, firstly, the legal right to defer the time

of his acceptance, or, in the language of option contracts, the time of election, that is to say, the time to determine for himself whether or not he will purchase the property and, secondly, an agreement by which if and when the election is timely signified, the owner becomes bound to transfer the property. What I am trying to bring out is sometimes expressed by saying that through the instrumentality of the option contract the optionee secures the privilege or right, at his sole pleasure, at any time during the option period, of raising a bilateral contract of sale and purchase.

The distinguishing feature of the option contract is that the proposal to sell may not be withdrawn by the optionor and the right of election thereby taken away from the optionee during the period of time given by the option contract to the optionee to signify his election to purchase.

The query early arose: How may the optionor be legally prevented from withdrawing his proposal, or offer, before the expiration of the stipulated time for election?

The expedient of paying a small sum of money to the optionor for the option privilege was resorted to and the courts finally adopted the rule that when the option contract is supported by a valuable consideration, the optionor may not withdraw his proposal during the period fixed by the option contract. In some jurisdictions where the common law rule upon the subject obtains, courts follow the rule that no consideration is necessary to support an option contract under seal.

The consideration we are speaking of is the consideration for the option contract standing by itself, so to speak, and not the consideration to support the bilateral contract to be raised out of the option contract. If the deal is one of purchase and sale of property for a cash price, to prevent withdrawal of the proposal by the optionor, the option contract must be under seal in the jurisdictions referred to, or supported by a valuable consideration, and of course the bilateral contract must also be supported by a valuable consideration.

Adequacy of consideration is vital for the enforcement by the optionee of the bilateral contract in a court of equity, but no such rule obtains with reference to the consideration for the option privilege. A small sum of money or any other consideration recognized as valuable by the common law is sufficient to support the contract for the option privilege.

One of the most interesting chapters in the development of the law of contracts is that concerning the Form of evidencing a contract transaction and what we call Consideration as making the promises of the respective parties mutual or binding.

In the early development of the common law the form by which the parties solemnized their agreement was the important thing. These ceremonial practices were not confined exclusively to ordinary agreements but extended to many other transactions the most notable of which was the conveyance of land. It will be recalled that conveyances of land at a very early date were manifested by livery of seisen. Livery of seisen and like customary practices were undoubtedly handed down from generation to geneeration through a long period of time.

It is related in the book of Ruth, Chapter IV, that Boaz having "purchased" Ruth to be his wife, desired to purchase from Naomi, her mother-in-law, the parcel of land owned by Ruth and her deceased husband, and it is there said "This was the manner in former times in Israel concerning redeeming and concerning changing, for to confirm all things; a man plucked off his shoe and gave it to his neighbor and this was a testimony in Israel."

When Abraham purchased the cave of Machpelah from Ephron, son of Heth, as a burial place for Sarah, the ceremony took place "in the audience of the children of Heth" and the price of 400 shekels of silver was paid over to Ephron "in the presence of the sons of Heth."

The practice of using seals to solemnize agreements may be accounted for in part, at least, by the custom in vogue before the era of printing and before handwriting became a common practice to emphasize formalities not only in business dealings but also in the many practices of the people some of which have continued unto this day.

The formalities attending business dealings are nothing less than part of universal customs which influenced and probably

regulated the dress of the people, their manners, their intercourse, their education and their religion. The most notable of these because they seem to be the most enduring, are the forms of service of religious sects and as applied to older civilizations and countries, their crafts and castes.

It is said in Anson on Contracts that the formal contract of English law was the contract under seal; that in no other way than by the use of this form could validity be given to executory contracts until the doctrine of consideration began to make way; that it was to form only that courts looked in upholding contract; that the consensus of the parties had not merged from the ceremonies which surrounded its expression; that courts of law would not trouble themselves with the intentions of parties who had not couched their agreement in the solemn form to which the law attached legal consequences, nor, on the other hand, where form was present would they ask for further evidence as to intention.

Later on, owing in great measure to the influence of Courts of Chancery, common law courts began to take account of the intention of the parties and the idea of the importance of form underwent a change.

When thereafter a contract came before the court, evidence was required that it expressed the genuine intention of the parties; and this evidence was found either in the solemnities of the contract under seal, or in the presence of consideration, that is to say, in some benefit to the promisor or loss to the promisee, granted or incurred by the latter in return for the promise of the former. Gradually, consideration came to be regarded as the important ingredient in contract, and then the solemnity of the deed was said to make the contract binding because it "imported consideration" though in truth it was the form which, apart from any question of consideration, carried with it legal consequences.

Anson says it is a difficult matter to determine how consideration came to form the basis upon which the validity of informal promises rests. He thinks the idea was borrowed by the common law courts from chancery and points out that the chancellor was in the habit of inquiring into the intentions of the parties beyond the form and that it was thus that bargain and sale of lands came to be enforced in chancery before the Statute of uses; that the doctrine when applied to simple contracts was found to be of great practical convenience and that, therefore, when a promise came before the courts, the question was whether the promissor was to gain anything from the promisee or whether the promisee was to sustain any detriment in return for the promise and if so there was a *"quid pro quo"* for the promise and an action might be maintained for the breach of it.

The law of consideration is summarized in section 1605 of the California Civil Code as follows:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

By section 1629 of the same code the distinction between sealed and unsealed instruments is abolished and section 1932 of the California Code of Civil Procedure also provides that there shall be no "difference" between sealed and unsealed writings.

Section 1929 of the California Code of Civil Procedure, however, classifies private writings as "sealed or unsealed". By section 1963 of the same code a presumption of a "good and sufficient" consideration for a written contract is raised and by section 1614 of the Civil Code a written instrument is made "presumptive evidence of a consideration."

Briefly and in a very general way I have called attention to form and consideration and pointed out the difference between proposal or offer on the one hand and the bilateral contract on the other.

The Form of contract as previously presented was used in the sense of solemnizing the mutual agreements of the parties.

It is now in order to call attention to the Statute of Frauds and to add that the agreement of the parties where it

falls within the provisions of that statute, must be evidenced in the form and executed in the manner required by the statute. This form has to do with its admissibility as evidence to prove the agreement: it, therefore, differs from a seal which the parties use to solemnize their agreement.

The ordinary option contract for the purchase of property does not vest any property interest or estate in the optionee. It gives the optionee merely the right of election to purchase the property. No interest or estate in the property vests in the optionee until a proper and timely exercise by him of the privilege. When that event takes place the optionee becomes in fact a vendee under the bilateral contract of sale and purchase raised by the election, and as such is entitled to all the rights and remedies of a vendee under an ordinary bilateral agreement of purchase and sale and is vested with the equitable title to the property.

As said in Hicks v. Christeson, 174 Cal. 712, 716, "An option is by no means a sale of property, but is the sale of a right to purchase," and in Ware v. Quigley, 176 Cal. 694, 698, "An option is not a transfer of property. No title is conveyed thereby. It is a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed."

It is by virtue of this rule that an oral agreement to procure from the owner of land an option to purchase the land, as well as an agreement of the optionee not to exercise his option so that a third party could purchase the articles independently of the option, are not within section 1624 of the Civil Code. (Howard v. Dobson, 39 Cal. App. 445; Flint v. Gigeuerre, 50 Cal. App. 314.)

Speaking technically the subject matter of an option contract is not within section 1091 or section 1741 of the California Civil Code which provide that an estate in real property other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by instrument in writing subscribed by the parties disposing of the same or by his agent thereunto authorized by writing. Nor is the option privilege of purchasing personal property at a price of two hundred dollars or more within section 1624 of the same code, unless, of course, it falls within the first subdivision of that section which requires an agreement that by its terms is not to be performed within a year from the making thereof, or some note or memorandum thereof, to be in writing and subscribed by the party to be charged, or by his agent.

The purpose of the option contract is not only to give a one-sided privilege to purchase, but also to provide and set forth the terms of the agrement which, when the option privilege is exercised, will evidence a contract in form and executed in manner that will legally entitle the optionee to the transfer of the property, and, if the optionor defaults, will entitle the optionee to go to a court of equity and there secure enforcement through the remedy of specific performance.

So, after all, the important thing is not whether the option contract itself falls within the Statute of Frauds but whether upon election the conditional agreement of sale and purchase set forth in the option and by election turned into a bilateral contract, meets the requirements of the statute. And it should be stated that unless the option contract does sufficiently set forth the price and the terms of the proposed sale and purchase, and is evidenced by writing subscribed by the optionor, the optionee will not be able to have the benefit of the remedy of specific performance.

In an option for the purchase of property, the time for the exercise of the option privilege is nearly always fixed by the option itself and in such cases the privilege must be exercised and signified to the optionor within the fixed time. In cases where the time is not expressly fixed by the option, the law fixes a reasonable time and the option privilege must be exercised and signified to the optionor within a reasonable time. If the option privilege is not exercised and signified within the period of time expressed or implied the option privilege comes to an end, or in the language of contracts, the option is discharged by lapse of time.

If the optionee desires to exercise the privilege and convert the outstanding or continuing offer into a bilateral contract of sale and purchase, certain acts on his part are necessary.

The act of the optionee which transforms the option into the bilateral contract is called "election" and the election may be manifested or signified in different ways.

The election must be signified exactly in accordance with the provisions of the option agreement and this observation applies to the person, to the time, to the place, and to every other condition set forth in the option agreement or implied from its terms. That is to say, the option may provide that notice of election shall be in writing, or that election shall consist of payment of a sum of money at a certain bank or other place, or to the optionor, or to any person designated by him, or that notice of election shall be mailed, or wired, or shall be signified by a certain act to be performed by the optionee, or upon or after the happening of a certain event, in either of which cases and in many more which could be mentioned, the optionee, at his peril, must exercise his right of election and signify it to the optionor exactly in the manner and form stipulated in the option or implied from the terms thereof. And a failure in any of these particulars works a discharge of the option privilege.

In the absence of special provisions, these rules obtain:

Election must be signified within the time fixed, or if not fixed, then within a reasonable time.

Manifestation may be by word of mouth, except where, in a particular case, notice in writing or some act or other form of manifestation is required by the option agreement, or is necessary to meet the requirements of the Statute of Frauds.

Election must be signified to the optionor, or to his representative or authorized agent.

Election must be signified by the optionee, or by his representative or authorized agent.

Where there are more than one optionor, or more than one optionee, the general rule is that signification by each optionee is necessary, but that signification to one joint optionor is sufficient to bind all joint optionors.

Signification of the election must be unconditional, that is, must raise the bilateral contract stipulated for in the option without substantial change of terms or conditions.

If the election has attached to it any condition or variation from the terms of the contract, such election is what is known as conditional, or qualifyiing, and is insufficient and does not have the effect of converting the option privilege into a bilateral contract. And there is a further rule that where an unauthorized condition is added to the election, the option privilege, in some cases, is thereby discharged notwithstanding the fixed option period has not expired.

The distinction between pure offers and options should be carefully noted. The conditional acceptance of a pure offer is a rejection and puts an end to it. The offer in such case, it is said, is no longer open for acceptance even though not withdrawn by the proposer.

In Niles v. Hancock, 140 Cal. 157, 161, it is said:

> "While, unless expressly revoked, an offer will ordinarily remain open for a reasonable time, a rejection of the offer relieves the party making it from liabiility on that offer, and dispenses with the necessity of further revocation; and where an offer has once been rejected, the party rejecting cannot afterwards, at his option, accept the rejected offer, and thus convert the same into an agreement by acceptance. The consent of the party making the original offer must be again manifested before there can be any contract. This of course is elemental. It is well settled that a proposal to accept, or acceptance of, an offer, on terms varying from those proposed, is a rejection of the offer, and puts an end to it. * * * A qualified acceptance is a new proposal. * * * A party who submits a counter proposition instead of accepting an offer cannot abandon the substitute and accept the original offer without the other party's consent."

The rule, however, does not apply to an option contract, that is, to an offer supported by consideration. In the option contract, the very thing for which the consideration is paid, is a fixed period of time within which to exercise the option privilege.

(Continued on Page 22)

Fruitful Effort

Every member of the Association has watched with exultation, and many of us with amazement, the splendid results achieved at Sacramento under the guidance of our President, Kemper B. Campbell. The Incorporation of the State Bar, ten additional judges for Los Angeles County, increased salaries for all of our judges, are but a few of the notable achievements.

The following letter written by Mr. Campbell gives some indication of the effort which was necessary to accomplish the program. Moreover, it will be a matter of real interest to our readers.

We all owe a genuine debt of gratitude to Mr. Campbell for his untiring, painstaking and unselfish service for the public good. Those of us who are better informed of the personal sacrifice you have made and are continuing to make in behalf of our Association assure you of our deepest appreciation, Mr. President.

To the Members of the Legislature:

Every county in the state is interested in these facts:

The population of the state and the business of the Supreme and Appellate Courts have practically doubled since there has been any addition made to the number of judges in those courts. The Second District Court of Appeal is now approximately four years behind in its work, and the Supreme Court is two years behind. Current business amounts to approximately 125 cases per judge, more than twice the possible average disposition.

There are now pending in the Supreme Court and District Courts of Appeal and awaiting decision, 2130 cases. In the report of the Judicial Council, dated April 16, 1927, it is estimated that it will require "about 30 judges in addition to the present membership of the appellate courts to clear the present calendars, and thus bring these courts up to within one year of their work."

According to the report of the Judicial Council, there will be 13 Superior Court judges available for transfer. All of these judges (or an equivalent number) should be transferred to assist the appellate courts. A delay of from two to six years in the handling of cases is a governmental disgrace and, in the public mind, is a serious reflection upon our judicial system.

The Judicial Council report shows that notwithstanding the fact that the judges of Los Angeles county transact more business per judge than any other judges in the state, the calendars, by reason of increase in population and consequent increase in business, are fifteen months behind. The congestion of these calendars is likewise a reflection upon our judicial system and serves to undermine popular respect for the courts, and is consequently a state-wide problem.

I invite your serious attention to the following figures:

Present number Superior Court judges in California	132
Judges in northern counties not busy and available for transfer, equivalent of	15
Net number now engaged	117
Los Angeles county judges	28
Engaged elsewhere than in Los Angeles	89
To be added by legislation and by transfer in counties other than Los Angeles	5
Total number required to transact judicial business outside of Los Angeles	94
Percentage of Superior Court filings in Los Angeles (Judicial Council Report)	41%
Percentage of filings outside Los Angeles county	59%
(If 94 judges are required to transact 59% of the state's business, it would require	65

judges to transact 41%—or an increase of 37 judges. However, Los Angeles county judges accomplish more than proportionate ratio of business and only 17 additional, making a total of 45, are asked.)

Los Angeles county percentage of state's population (Comptroller's estimate)	42%
Percentage assessed valuation property (excluding operative public utility), Comptroller's figures	44%
Los Angeles county percentage Superior Court filings (not including Municipal Court filings, jurisdiction $300 to $1000, absorbed from Superior Court at county's expense—figures Judicial Council	41%
Los Angeles county increase in population since 1920	137%
Los Angeles county increase in property values since 1920 (State Controller's figures)	152%
Los Angeles county increase in number of judges since 1920	40%
Los Angeles county present proportion Superior Court judges	22%
On basis of output Alameda county, comparable with Los Angeles (Judicial Council report), requirement	49 judges
On basis San Diego county, granted increase in judges,—Los Angeles requirement	51 judges
On basis San Bernardino county, granted increase in judges,—Los Angeles requirement	60 judges

Los Angeles county is asking an increase to but 45 judges, much less than its proportion.

The above request does not take into account the rapid increase in population during the next two years. Nor do the above figures take into account an accumulation of business now *fifteen months in arrears.*

H. H. Blakeley, secretary of the Superior Court, estimates the requirement of additional judges until the next session of the Legislature at a minimum of 20.

Owing to the fact that the cost to the state and county of maintaining transferred judges, together with their traveling expenses, is approximately $4,000 each per annum, there is no financial saving in transferring judges to Los Angeles county.

We feel that this is an appeal in behalf of our judicial system and in behalf of litigants all over the state of California.

It is much to be desired that the people shall have respect for the courts. This respect cannot be maintained under the

present condition of the court's calendars.

Statistics show that the volume of output of our judges compares favorably with the amount of business transacted by judges anywhere in the United States.

We increase our schools and school teachers in proportion to our population. Judicial business increases likewise. It is just as unreasonable to presume that double the amount of judicial business can be transacted with the same amount of judges as that double the amount of pupils can be taught by the same number of teachers, or housed in the same number of school buldings.

I sincerely trust that you will render a most effective aid to the courts of California by using your influence to increase the number of judges in Los Angeles county to an amount sufficient to allow for the transfer of judges not otherwise engaged to assist the Appellate Courts.

I understand that the Judicial Council has reconsidered its recommendation of but five judges for Los Angeles county and has left the matter of the number to be allowed with the Governor and the Legislature, holding that the request for at least 17 additional judges for Los Angeles county is justified upon the basis of the previous reports of the Judicial Council.

Yours sincerely

KEMPER CAMPBELL,

President Los Angeles Bar Association.

Dated: April 25, 1927.

Special announcements by law firms of new locations and new associations are most effectively made to the profession through the pages of the BULLETIN. *In addition, such announcements serve as a manifestation of good-will toward and co-operation with the* BULLETIN *in its program of constructive endeavor for the welfare of the Bar Association.*

Case Notes

WILLIAM E. BURBY *of the Los Angeles Bar*
Professor of Law, University of Southern California

PERSONS—EFFECT OF DECREE OF DIVORCE ON AN ILLEGAL MARRIAGE—COLLATERAL ATTACK—CIVIL CODE, SECS. 60, 193 AND 195; CODE OF CIVIL PROCEDURE, SEC. 1908.

A recent California case, *Estate of Robert S. Lee,* 73 Cal. Dec. 154, 253 Pac. 145, presents an interesting question under sections 60, 193 and 195 of the Civil Code.

Section 60 provides: "All marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void." Section 193 provides: "All children born in wedlock are presumed to be legitimate." Section 195 provides: "The presumption of legitimacy can be disputed only by the husband or wife or the descendant of one or both of them." Section 1908 of the Code of Civil Procedure determines the conclusiveness of a judgment of a court of competent jurisdiction.

In the Estate of Lee we find the following set of facts: Robert S. Lee, a mulatto, and Marie Dierse, a white woman, engaged in a marriage ceremony May 16, 1895. Josephine Lee Wrynn was born as issue of Marie Dierse Lee July 5, 1895, and during coverture of Robert and Marie Lee. Lee obtained a decree of divorce from Marie Dierse Lee March 26, 1903. Upon the death of Lee in 1912, his will was offered for probate. Josephine Lee Wrynn was not recognized in the will and she alleges that she is entitled to distribution of the estate as heir of Robert S. Lee. She bases her claim to heirship upon the presumption of legitimacy as declared by section 193 of the Civil Code and contends that in this case, no proper parties are before the court who may contest her legitimacy and bases this claim on section 195 of the Civil Code. The facts of the marriage ceremony and of the obtaining of the decree of divorce by Lee were not contested. Evidence was also permitted to be introduced to the effect that Lee was not the father of Josephine and also that Lee was a mulatto. It was contended that Josephine was not the issue of Robert and Marie Lee, and that their marriage was void, and that none of the parties should derive any advantage from such marriage.

The courts of our country have held the effect of statutes similar to provisions in section 60 of our code, is to render the marriage void *ab initio,* and that either party to such marriage may disregard it and that neither can obtain any other rights of a lawful marriage. Such was the holding of the court in *In re Walker,* 5 Ariz. 70, and also in the case of *Oldham v. McIver,* 49 Tex. 556.

A somewhat similar matter as that in the case of Lee was before the court in the case of *Honey v. Clark,* 37 Tex. 686. In a very scholarly opinion written by Justice Walker in which the court fully discussed the effect of statutes similar to section 60 of our Civil Code, it was held: That such a statute will not effect the legitimacy of children born to one in bondage and thereafter by statute legitimated. The Texas case differs somewhat from the Lee case in that in California we do not have a statute declaring issue of such a marriage as in the Lee case to be legitimate. The court in determining the rights of the parties in the Lee case first determined that one of the purposes or rather the primary matter to be determined in a divorce is the fact that a marriage relation exists and if it be found that such a relation does exist, then the purpose of the action is for a dissolution of such relationship.

The court in the instant case concluded that a decree of divorce having been granted, and no contest to such decree having been filed within the proper time, such decree was conclusive that a marriage relationship did exist; and then, invoking the presumption under section 193, and the fact appearing that no one designated in section 195 was before the court to contest the legitimacy of Josephine Lee, held the evidence regarding the illegitimacy of Josephine should not have been introduced, and, therefore, that Josephine was entitled to a judgment that

she was sole heir of Lee and entitled to the distribution of his estate.

The judgment does not decree that a marriage declared by our code is in fact marriage declared by our code to be void is in fact valid, but under the particular circumstances of the case the judgment has that effect as to the rights of the parties.

G. E. W.

ATTORNEY AT LAW AS EXECUTOR—RIGHT TO ACT AS OWN ATTORNEY—RIGHT TO EMPLOY COUNSEL—RIGHT TO ATTORNEY'S FEES.

It was held in the *Estate of Parker*, 73 Cal. Dec. 33, that an executor who is an attorney at law may act as his own attorney, but is not entitled to compensation as such attorney; that such executor may employ another attorney to render necessary legal services and is entitled to an allowance out of the estate therefor; that such an executor may not employ the members of his firm to act as his attorneys unless it is agreed between him and his partners that he is not to share in the monies to be received by the firm for its services.

The executor in the decided case was a member of a Boston law firm. The lower court allowed him compensation for ordinary executorial services, compensation for extraordinary executorial services, compensation for ordinary legal services, and $40,000.00 for extraordinary legal services. The executor employed his firm and two Los Angeles lawyers to assist him in the performance of legal services.

The only question raised in the case was as to the validity of the order allowing $40,000.00 for extraordinary legal services. It was held that the order was erroneous in that it allowed the executor attorney's fees for legal services performed by him. The court recognized that the Los Angeles counsel employed by the executor would be entitled to reasonable compensation for their services.

The court placed its decision upon the rule that a trustee shall not place himself in a situation to have his interests conflicting with his duty as a fiduciary.

P. V.

ASSIGNMENT OF OPTION SEPARATE FROM LEASEHOLD INTEREST.

Cline, the owner, leased property for a term of ten years to Ah Chun, a person of Mongolian blood and subject of the empire of China. The lease contained a provision whereby the lessor agreed to convey the premises to the lessee at any time during the term for the sum of $4,100. Ah Chun later assigned the option to purchase to Mott, without making, or purporting to make, an assignment of the term. Mott sought to exercise the option but Cline refused to convey, and this action was brought for specific performance. In this case, because of the alien land laws, the original lessee Ah Chun could not have enforced the option agreement. In denying relief because sufficient tender had not been made by Mott, the court stated that the assignment of the option was valid and enforcible by the assignee. *Mott v. Cline* (Feb. 17, 1927), 253 Pac. 718.

It is common knowledge that an option contract is valid and that, in the absence of special circumstances indicating an intention that it be considered as personal, it is assignable. It is equally clear that an option agreement contained in a lease is valid and that, subject to the same qualification as noted above, it can be enforced by an assignee of the leasehold interest. Some courts have held that "it is a covenant running with the land." *Blakeman v. Naglee*, 9 Cal. 662. That an option to purchase, incorporated in a lease, is regarded as running to the assignee of the lease, in the absence of a stipulation to the contrary, see *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587. It is to be noted in the instant case, however, that no assignment of the leasehold interest was made. The court states: "Inasmuch as the contract contains no features of personal trust or confidence reposed in any of the parties, and requires nothing more than a mere routine of paying money, it is assignable." The court applies the same rule to the instant case as is usually applied to separate option agreements. This conclusion is justified by the bald statement that "The option provision is clearly severable from all other provisions of the lease, and no injury could possibly come to the owner and lessor by receiving the cash purchase price, to-wit, $4,100, from the optionee's assignee, rather than from the optionee." One wonders what provisions in the lease

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Book Reviews

By HARRY GRAHAM BALTER *of the Los Angeles Bar*

GILBERT'S COLLIER ON BANKRUPTCY, a treatise on the law and practice in bankruptcy; by Frank B. Gilbert of the Albany, New York, bar, two volumes in one; and 1614 pages; 1927; Matthew Bender and Company, Albany, New York.

Any attorney who is at all acquainted with bankruptcy practice knows that Collier on Bankruptcy has long been the standard authority in this field. Thirteen editions of the work have from time to time been offered to the profession in response to its demands. The thirteenth edition of 1923 was an exhaustive four-volume treatise.

On August 27, 1926, the 1926 amendments to the Bankruptcy Act of 1898 went into effect. These amendments are perhaps the most numerous and important of all amendments which have been made to the Bankruptcy Act. More than thirty sections and sub-sections are materially changed, affecting both the substance of the act, and the practice thereunder.

In response to a persistent demand for a single volume edition which would include and discuss these latest amendments, the present work, *Gilbert's Collier on Bankruptcy*, was offered to the profession.

This volume is essentially in the same style and fashion as the other single volume editions of this work. The text, discussing and explaining the provisions of the act, is arranged and classified in accordance with the Collier plan. The section of the Bankruptcy Act is given at the beginning of the chapter; an analysis or synopsis of the subject matter of the chapter is then given; and the discussion follows. The discussion of each chapter is thus built around the provisions of the portion of the act quoted at the beginning of the chapter.

It is really amazing how much law is crammed into this single volume. It is truly a compendium of the law of bankrutcy, sufficiently extensive to be of actual practical help. It would hardly be useful to list the subject matters covered in this volume. Suffice it to say that the entire field of bankruptcy law is completely covered. The excellency of the prior editions of Collier on Bankruptcy is the best recommendation for this latest, which adds to rather than detracts from, the enviable reputation already earned for this work.

Of especial added value are the following features: (1) The General Orders in Bankruptcy, adopted by the Supreme Court of the United States at the October term, 1898, and amended to July 1, 1926. (2) Official Forms in Bankruptcy as prescribed by the Supreme Court of the United States, at the October term of 1898, amended to July 1, 1926, consisting of 63 very useful forms. (3) Supplementary Forms, unofficial, but cover the most common features of the practice in bankruptcy, based upon the practical experience of referees and practitioners; a list of 219 useful forms.

The profession will no doubt welcome this new compact one volume work, because it answers the demand for a ready reference work that is easy to manipulate.

HUDDY ON AUTOMOBILES; Xenophon P. Huddy, LLB, of the New York Bar; Eighth edition by Arthur F. Curtis, of the New York Bar; 1927, and 1480 pages; Matthew Bender and Company Albany, New York.

Every lawyer nowadays should know a great deal about "Automobile Law." It has gradually developed into a body of law, all its own. A knowledge of the simple principles of negligence is no longer sufficient. "Automobile Law" actually embraces phases of many fields of law, all the way from Constitutional Law to Insurance Law.

Huddy on Automobiles is no doubt a standard work in this field. The present eighth edition has been found necessary by reason of the ever-increasing volume of new case law in this field. By enumerating only a few of the chapter headings of this work, the reader may get an indication of the vast field that a good work on "Automobile Law" must now embrace. The more important subjects discussed follow: (1) Nature and Status of Automobile, (2) General Right to Use Highways, (3) Statutory Regulation of Motor Ve-

hicles, (4) Federal Control Over Motoring, (5) Licenses and Registration, (6) Public Carriage for Hire, Jitneys, Taxicabs, etc., (7) Private Hire of Motor Vehicles, (8) Garages, Filling Stations, etc., (9) Law of the Road, (10) Negligence in Operating of Motor Vehicle, in General, (11) Speed and Control, (12) Duty to Avoid Injury to Pedestrian, (13) Liability for Act of Chauffeur, Master and Servant, Family Cars, (14) Manufacturers of Motor Vehicles, (15) Insurance, (16) Sales of Motor Vehicles, (17) Chattel Mortgages, (18) Conditional Sales, (19) Evidence, (20) Transportation of Intoxicating Liquors.

It is evident from even this partial survey that practically every problem that will ordinarily be faced in dealing with a case in any way involving the ownership, use or sale of a motor vehicle, is discussed in this work. The copious footnotes make this volume useful as a digest as well as a commentary on "Automobile Law."

CASE NOTES

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indicated that it was "clearly severable" from the other provisions in the lease. There was no separate and distinct consideration to support the option except the covenant to pay rent, and other covenants on the part of the lessee pertaining to the leased premises. This question would seem to be fully covered by secs. 1639 and 1642 of the Civil Code.

In the interesting case of *Meadow Heights Country Club v. Hinckley, et al.*, (Mich. 1924) 201 N. W. 190, a similar situation was presented to the court for consideration. In holding that the option was not a separate and distinct part of the lease the court stated: "The option to purchase was not an agreement apart from the lease itself * * * The parties made the option to purchase an integral part of the lease, and we are not inclined to dismember their contract. The contract was made as a whole, and must be considered as such. An option accorded a lessee to purchase premises during the term is not an agreement foreign to a lease, but quite intimately connected with the contract * * *." See also, 35 C. J. 1038, sec. 182, where it is stated, "An option to purchase, being an integral part of a lease, is a substantial part of the whole contract."

It is submitted that where an option to purchase is contained in a lease, unless circumstances appear which indicate clearly that the option be considered as a separate and distinct agreement, it should be considered as an integral part of the lease, that the whole be considered as one contract, and that an assignment of part of the contract should not be permitted.

W. E. B.

OPTION CONTRACTS

(Continued from Page 10)

An insufficient exercise of the option privilege within the time limit may, or may not, terminate the option period and prevent another or subsequent election. The facts control. It is suggested that if a defective, insufficient, or unauthorized election is signified, and upon discovery of the mistake, a new and proper election is manifested within the fixed option period, the election is good in respect to its timeliness.

The same rule would apply to a conditional election where, in a subsequent signification, the unauthorized condition is omitted.

In my opinion a mistake in the exercise of the option may be corrected by the optionee at any time during the remaining option period, except where the optionee make and knowingly and purposely stands upon the form of his signification as sufficient to meet the requirements of the option contract. In such case the optionee exhausts his right and may not subsequently again rightfully signify his election.

The distinction we have pointed out is noted in McCormick v. Stephany, 61 N. J. Eq. 208; 48 Atl. 25. The lessee in signifying his election to purchase made unauthorized demands on the lessor, but in a subsequent signification within the option period, conformed it to the provisions of the lease.

The Vice-Chancellor after referring to the general rule that a qualified or conditional acceptance of an offer was, in effect, a rejection of the offer and that consequently a subsequent acceptance could not legally be made, said:

"But this principle and the line of cases which support it have no application in the present cause where a valuable consideration has moved. The agreement to sell was contained in a lease of the premises and in such cases the payment of the rent is held to be applicable as consideration for the agreement to convey at the named price. * * * Such an agreement to convey is not a mere unaccepted proffer based upon no consideration, as is a letter offering to sell, nor is it a naked promise to sell at a price within a limited time. It is a completed purchase of a right to have a conveyance if the purchaser shall choose to buy upon the terms named. * * * In such cases there is no question of the arrival of the parties at a common intent. They have already made a contract upon consideration paid by which the owner is bound to convey whenever the condition happens and the making of a counter proposal to him does not enable him to retain the consideration paid and to declare the contract forfeited. If the transaction was a mere proffer it might be withdrawn before acceptance but when it was a contract for consideration paid, the party obligated to sell, if required, could not withdraw pending acceptance."

One of the troublesome questions frequently arising in connection with election is the determination whether or not any act on the part of the optionee is necessary other than communication of the fact that the optionee has elected to purchase the property. If additional or other acts are required they must be performed in order to effect a good election.

Not infrequently the option contract requires either as the act of election itself, or in addition thereto, payment or deposit of a certain amount of money, or delivery of certain documents, or the doing of a particular act which may be entirely outside of, but more usually is directly connected with, the option transaction.

In every case the option contract itself furnishes the test of the sufficiency of election and if the performance of a particular act is stipulated as the mode of signifying the election, or is added to that of formal notice to the optioner, these stipulated requirements and conditions must be exactly observed or the bilateral

contract of sale and purchase will not be raised and the optionee will derive no benefit from the option contract.

In Flickinger v. Heck, 187 Cal. 113, it is said:

> "An option contract may be regarded as embodying an offer. When the optionee, or person to whom the offer is made, signifies his desire to accept in accordance with the terms of the option, the optionor, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called 'election' and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever acts have been specified in the option contract. * * * The particular act or acts which constitute an election may be fixed by the terms of the option, as also the time when, the place where, and the person to whom it shall be made. * * * The language of the contract itself controls as to what act or acts constitute an election. Under the terms of one option, election may consist of a tender of the property to be sold or purchase price to be paid; under the terms of another option, it may consist of a mere notice of election to purchase or sell, leaving payment of the price and delivery of the property as subsequent matters in performance of the executory contract raised by the election. * * * If the tender of property or purchase price constitutes an 'election' it must be performed in order to turn the offer contained in the option contract into a contractural obligation and, if not performed as provided in the option contract, no subsequent contractural liability arises; if the tender is merely in performance of the contract created by a notice of election, it is controlled by the terms of that contract and in the absence of anything in the contract itself, the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property. * * *"

The real worth and, perhaps I should add, the utility of any agreement is measured by the effectiveness of the remedies available to the promisee for its enforcement. This statement is peculiarly applicable to option contracts for the purchase of property.

If the option privilege is not exercised by the optionee, the option contract is discharged and the discharge ends the rights and cancels the obligations of the parties. If the option privilege is exercised timely and properly, there comes into existence a full-fledged, two-sided contract of sale and purchase.

The remedies for the enforcement of the bilateral contract are the same whether the contract is brought into legal existence by acceptance of a proposal or offer, or by election under the option contract. These remedies are familiar to the lawyer and now-a-days to laymen.

Specific performance, however, is the remedy usually resorted to. In fact I think it may be assumed that every option to purchase property is taken in reliance on the fact that courts of equity enforce performance of such contracts as a matter of course in every instance where plaintiff's case meets the requirements of the equity rules pertaining to that remedy.

I shall refer to two rules only: Adequacy of Consideration and Mutuality.

Adequacy of consideration has been previously mentioned in connection with the discussion of formation of the option contract. The conclusion was reached that a valuable consideration was sufficient to support the option contract and make that contract binding upon the optionor for the option period.

A court of equity examines the question of consideration not with a view of determining whether it is valuable but for the purpose of ascertaining whether the consideration fixed by the agreement for the option property is a fair price for the property. In other words, a court of equity is concerned with the fairness of the contract to be enforced and this statement is just as true of each term of the contract as it is of the price for the property.

Whatever may have been the uncertainty in the earlier development of the law, it is now established that adequacy the consideration within the equity rule means adequacy of the consideration for the property purchased under the option agreement and not adequacy of the consideration for the option privilege.

In Marsh v. Lott, 8 Cal. App. 389; 97 Pac. 163, it is said:

"Subdivision 1 of section 3391, Civil Code, makes an adequate consideration for the contract one of the conditions for the specific enforcement thereof. The provision, however, has reference to the consideration to be paid for the property, the right to purchase which at a stipulated price within a given time is the subject of the option. It has no application to the sufficiency of the consideration paid for the executed contract, whereby defendant transferred to plaintiff the right to elect to purchase at the stipulated price. It is not the option which it is sought to enforce, but that which, by plaintiff's acceptance of defendant's offer, has ripened into an executory contract, whereby for an adequate consideration, the one agrees to buy and the other agrees to sell. 'The sale of an option is an executed contract; that is to say, the lands are not sold; the contract is not executed as to them; but the option is as completely sold and transferred in *praesenti* as a piece of personal property instantly delivered on payment of the price. * * * From the very nature of the case, no standard exists whereby to determine the adequate value of an option to purchase specific real estate. * * * Iin our judgment, any money consideration, however small, paid and received for an option to purchase property at its adequate value is binding upon the seller thereof for the time specified therein and is irrevocable for want of its adequacy."

Some of the distinctions between pure offers and option contracts have previously been referred to. The chief distinction is that a pure offer may be revoked by the proposer at any time before acceptance by the party to whom the proposal is made. When, however, the proposal has been properly and timely accepted this distinction disappears, and such acceptance has the same effect as a proper and timely election under an option contract.

In W. G. Reese Company against House, 162 Cal. 740, it is said:

"Even if an option be given without any consideration, a binding agreement of purchase and sale results from an acceptance of the option during its life. The only importance of the consideration as bearing upon an agreement giving an option is that where there is a consideration, the option cannot be withdrawn during the time agreed upon for its duration, while if there be no consideration the party who has given the option may revoke it at any time before acceptance, even though the time limited has not expired. In the absence of a consideration the option is nothing more than an offer to sell."

As we approach the subject of mutuality we find that there are two subdivisions: mutuality of obligation and mutuality of remedy.

If the facts are such that one of the parties is without remedy against the other, there is said to be lack of mutuality of remedy and it is an inflexible rule of equity that unless there is mutuality of remedy, specific performance will not be granted.

The rule requiring mutuality of obligation is not a rule peculiar to a court of equity nor to the remedy of specific performance. A party going into equity for specific performance must, of course, go there with a validly made contract.

The defense of want of mutuality of obligation is not different from any other defense going to the validity of the contract. Courts of equity will not specifically enforce unilateral contracts, so-called, whether in form of unaccepted proposals, or proposals untimely or conditionally accepted; but once an agreement in law and in fact is reached, a court of equity lends its remedy of specific performance in every case with the exception in some jurisdictions of contracts terminable at the will or pleasure of the plaintiff.

The California Civil Code has summarized the law touching specific performance.

Section 3391 provides that specific performance of a contract cannot be enforced against a party who has not received an adequate consideration for the contract, or if the contract as to him is unjust or unreasonable, or was obtained by unfair practice, or if his assent was improperly obtained.

Section 3386 provides that neither party to the contract can be compelled specifically to perform it unless the other party has performed or is compellable specifically to perform. And section 3388 provides that a party who has signed a written contract may be compelled specifically to perform

it altho the other party has not signed the contract, provided the party signing has performed or offers to perform the contract on his part.

It is sometimes loosely stated that where, for any reason, a contract is incapable of being specifically enforced against one of the parties, that party will not be entitled to have the contract specifically enforced against the other.

This statement is undoubtedly true in a case like Railway Company v. Johnston-Campbell, 153 Cal. 106, which involved the enforcement of a contract to build and operate a railroad on one side, and on the other the conveyance of rights of way and bonus acreage of land upon completion of the road which had not been completed at the time suit was brought to compel conveyance of the land. The statement, however, is not accurate as applied to every case. Mutuality does not imply that each party must have precisely the same remedy either in form, effect or extent (Paper Co. v. Paper Co., 293 Pa. 434; 129 Atl. 559).

It is said by Justice James in Feisthamel v. Campbell, 55 Cal. App. 774, 780:

"If mutuality, in a broad sense, were held to be an essential element in every valid contract, to the extent that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract, or a contract evidenced by a subscription paper, or a contract to enforce a reward offer, or a guaranty, or in many other instances readily put in ordinary business affairs * * * An option, supported by a consideration, furnishes another illustration of a contract which is valid, notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it."

The correct rule is embodied in section 3386 of the Civile Code, the substance of which is that one party to a contract cannot be compelled specifically to perform it unless the other party thereto has performed or is compellable specifically to perform everything to which the former party is entitled thereunder.

Mutuality of obligation in a bilateral contract, or the necessity for a consideration, has to do with the making of a contract, whereas mutuality of remedy has to do with the enforcement of the respective promises of the parties. Hence, mutuality of obligation is essential to the existence of a valid contract, whereas mutuality of remedy may not exist at the time of making the contract and may arise thereafter and the rule is that if mutuality of remedy exists at the time suit is filed, or is brought about by the suit itself, specific performance will not be denied for lack of mutuality.

It is by virtue of this rule that a court of equity will, in a case otherwise proper, enforce specific performance of an agreement for the sale and purchase of land at the suit of the vendee, based upon an oral acceptance of the written offer signed by the vendor. (Copple v. Aigeltinger, 167 Cal. 706, 710.)

I have presented some of the more important rules of law relating to option contracts. The really interesting part of a law subject, however, is not its general rules but the application of the rules to the varying facts of particular cases.

The concrete world is absorbing. In it you see man in action. You see the lawyer expounding and, perhaps, trying to bend this rule or that rule, in order to make it fit his view of the facts of the case, and you see the jurist applying and analyzing and, perhaps, whittling at a particular rule, or a long established precedent in order consistently to do justice between man and man.

If you ask what is the decisive thing in a law suit, the answer is, the facts, meaning that by processes which we do not understand, the mind of the judge is driven to correct conclusions from the facts, and these conclusions are carried into effect as his judgment in every instance except where prevented by statute, or where some property rule would be disturbed.

As in a law suit, so in law books and in addresses of this sort. Rules are useful and helpful, but they do not reach the heart of the subject. The real value of a treatise on a law subject lies in exposition of the application of the rules to the facts of particular cases. The lawyer and the judge get helpful assistance from decisions of the court and from the works of law writers but very little from codes and codifiers.

It is for these reasons that, in conclusion, attention is called to a few interesting and instructive decisions.

No rule is more firmly established than the one to the effect that in order to raise a binding contract of sale and purchase out of an option on property, the option privilege must be signified to the optionor within the period fixed by the option contract. Notwithstanding this rule, there are numerous decisions, and, on the facts just decisions, helping out an optionee where justice demanded the intervention of the court.

In a New York case (Holden v. Corporation, 234 N. Y. 437, 138 N. E. 85), plaintiff was the holder of a ninety-day option to purchase real estate and was led to postpone the exercise of his rights under the option by the vendor's promise to extend the option time. Plaintiff let the option time go by, then offered performance which was refused, and then brought suit for specific performance. It appeared that plaintiff was induced to postpone tender by repeated assurances from the optionor that the option would be kept alive. Technically and in accordance with strict rules on the subject, the option period having expired, a bilateral contract could not be raised. However, the court said that while it could not hold that there was a new contract, modifying by oral promises the terms of the written option, nevertheless, on the facts, the optionor was estopped to terminate the rights of the optionee without giving him notice and a reasonable time to exercise his option rights.

Courts of equity do not take the position that they may arbitrarily extend the time of election under an option contract. They seek to measure out justice by invoking the rule of estoppel, of waiver and of kindred rules and their reports contain numerous instances where but for the interposition of these wholesome rules justice would have miscarried.

In a New Jersey case (Brick Company v. Lorillard, 48 N. J. Eq. 295, 22 Atl. 203), a lessee supposing his option ran to March 24, 1887, applied to the assignee of the lessor's interest, prior to March 1, 1887 (the last day of the option time), to have the option extended for two years. The assignee agreed to give him an answer on March 7, 1887, at which time he informed the lessee that the option would not be extended, but promised to have the deed ready on March 24, 1887. On that day the lessee tendered the amount stipulated in the lease as the price. The court remarking that there was no doubt the parties understood, intended and believed that the option time expired on the 24th of March, held that, on the facts, the lessee was entitled to specific performance.

In another case (Longfellow v. Moore, 102 Ill. 289), the optionor agreed to extend time limit of the option and then by his acts put the optionee off his guard by reason of which acts the optionee permitted the option time to expire without exercising the option privilege. It was held that the optionor, on the facts, was estopped to challenge the election made within the extended period of time.

In a New York case a tenant occupied the premises under a lease, giving him the privilege of extending the leasehold term upon written notice, at a fixed date, but was unexpectedly in a foreign country on the day fixed for giving such notice, but did give notice some eighteen days thereafter, immediately upon his return to New York. The court held there was no ground for relief. (Simon v. Schmidt, 118 N. Y. S. 326.)

In an Arkansas case the optionee gave notice of election by letter through the mail but the letter was not received by the optionor. The contract did not authorize notice by mail. The court held that there was no ground justifying the interposition of a court of equity to help out the optionee. (Bluethenal v. Atkinson, 93 Ark. 252.)

There are many more court decisions of substantially the same tenor as the foregoing. Analysis with a view of harmonizing all of them is impossible.

The purpose here is more particularly to call attention to the application of the rules to the facts of the particular cases and to the human agency set up to solve the problems presented.

In practically every case the court endeavors to reach conclusions in accord with equitable principles but the decisions disclose that conflicts and variances on similar facts are not infrequent.

In some cases the decision is placed upon the ground of waiver and in others upon the ground of estoppel and not infrequently the distinctions between the two are lost sight of.

The distinctions between the two may be stated thus:

The rule of waiver may be invoked against the optionor in those cases where

the signification or other act of the optionee has actually been made or done but not strictly in accordance with the provisions of the option contract, as for instance, the acceptance by, and the acquiescence of the optionor, in an oral election under an option contract requiring written election, or for instance, an election without payment of a certain part of the purchase price for the property under an option requiring payment at the time of election, where the optionor treats the election without payment as sufficient.

In these and like cases the optionee has actually attempted to do the act required but has not done the same strictly in accordance with the option contract.

The doctrine of estoppel is applicable to another state of facts, that is to say, to cases where the optionee by reason of accident, death or other cause fails to perform, that is, fails to signify election within the option time, or at all, or perhaps does signify the election to the optionor reasonably prompt, under the circumstances, but after the option time has expired.

The rule, we gather from the best considered decisions, is that the court must accept and enforce the option contract as made by the parties, and that it is not within its province or power to help out an optionee by supplying an election when in fact no election has been signified, nor to dispense with any other required act on the part of the optionee, unless facts exist which justify the application of the rule of estoppel.

The foregoing statement of the law of option contracts has brought to mind more clearly and forcibly than ever before the very important parts the bench and the bar have taken in the development of the law.

The option contract is just another circumstance, so to speak, showing that the law may be adapted to the ever changing requirements of business. The idea that the presence of a valuable consideration would have the effect of converting the offer into an option contract was borrowed from the existing law of contracts and the invention, if you please, was that of the lawyer and of the judge.

A Burbank takes a few thorns from a very common plant and is acclaimed a wizard. The names of the men who havebench and of bar. made our great discoveries and given us our great inventions are household words. The processes by which the option contract has been evolved are just as striking in their originality and have contributed as much to the general welfare of society as those above mentioned but the names of the latter are lost in the whirl of great enterprise and big business and hence are unknown to the general public.

The study of any of the numerous forms of contract is exceedingly fascinating. The option contract is not an exception. The student does not go far into the subject before he discovers that there is a compelling philosophy underlying the administration of law by courts.

The system of equity jurisprudence, known to our law and administered by our courts, is the unrivaled repository of the legal wisdom of the ages, and today more than the legislatures of all states and congress combined, is the force that keeps the lawbreaker within bounds, that exposes fraud wheresoever and by whomsoever, that brings the guilty to its bar slowly sometimes but surely, and measures out justice between man and man with a care and a conscience that stand, as they have stood for centuries, unchallenged for righteousness.

The option contract is the child, if you please, of equity. There is nothing in the statute book anywhere to give life to that form of dealing, a form of transaction which we now esteem so essential and in fact indispensable for the conduct of our affairs.

It was from the Chancellors that we got the bilateral contract, or rather the theory of consideration upon which that contract is founded, and it was a court of equity which first upheld the validity of option contracts and promulgated the rule that a proposal or offer supported by a valuable consideration was not revocable by the optionor during the time fixed by it for exercise of the option privilege.

Comparatively, the option contract in its development is a small matter in any survey of equity jurisprudence, but I could not miss the opportunity to bring out that equity extends its jurisdiction alike over small and over great matters; that it stands as it has stood unimpaired in its usefulness during the reigns of many kings and as the greatest and noblest achievement of